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FAMILY LAW

Cases and Materials

Volume II

**Carol Rogerson
Faculty of Law
University of Toronto**

2018-2019

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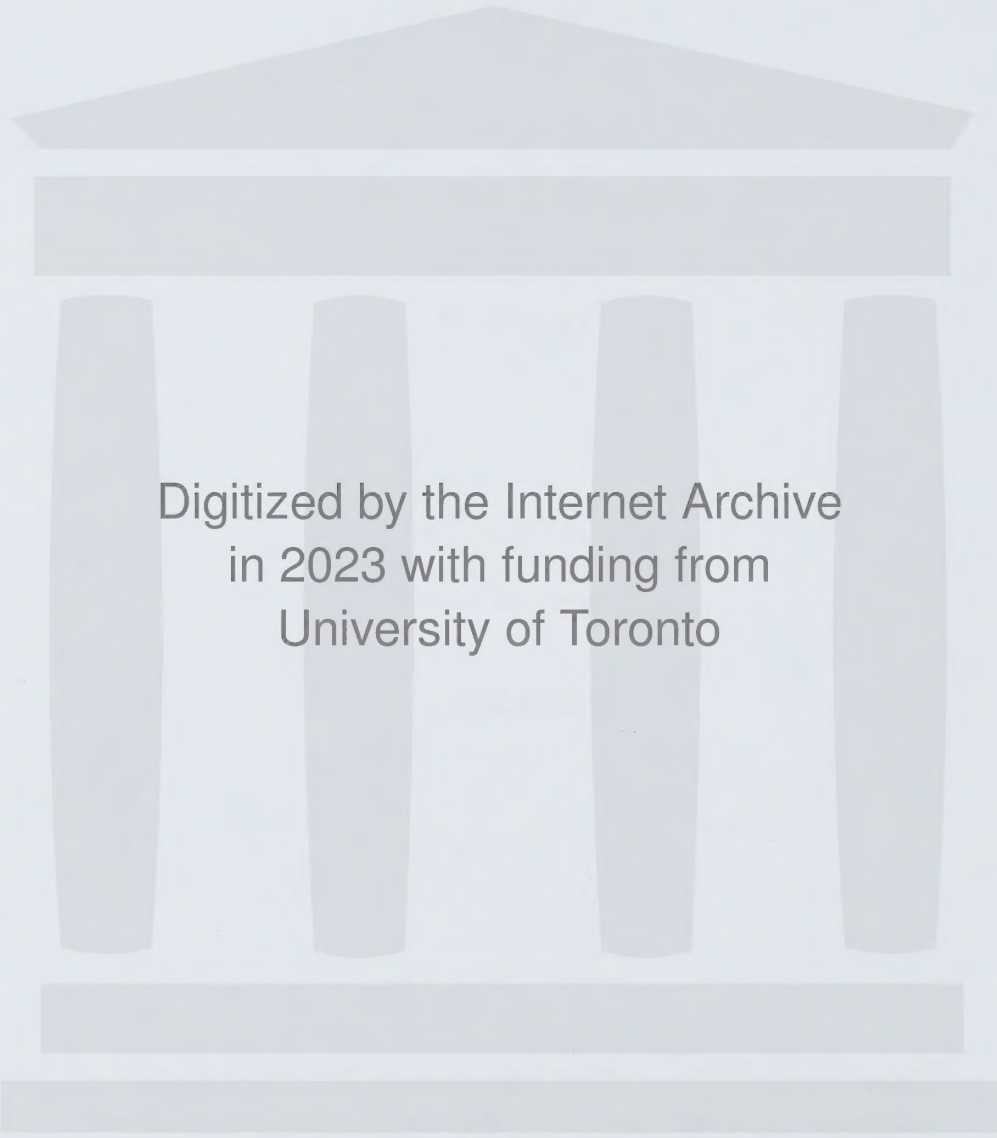
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FAMILY LAW VOLUME II

Table of Contents

Page No.

IV. THE ECONOMICS OF MARRIAGE BREAKDOWN

A. The Economics of Marriage

Statistics Canada “Study: Employment patterns of families with children, 1976-2014”, <i>The Daily</i> , June 24, 2015	286
Statistics Canada, “Study: Women in Canada: Women and Paid Work”, <i>The Daily</i> , March 8, 2017	288
Statistics Canada, “Household Income in Canada: Key results from the 2016 census”, <i>The Daily</i> , Sept 13, 2017	289

B. The Economic consequences of Divorce

Note: the Economic Consequences of Divorce	291
Robert Leckey, “Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past” IRPP, <i>Choices</i> , vol 15(8), July 2009, at 7-9, 30	292
“Incomes of Lone-parent Families” from Vanier Institute of the Family, <i>Profiling Canada’s Families IV</i> , 2010, at 104-5	293
Statistics Canada, “Children living in low-income households”, <i>Census in Brief</i> , Sept 13, 2017	294

V. MATRIMONIAL PROPERTY

A. Historical Overview

(a) Common Law and the Regime of Separate Property

Ontario Law Reform Commission, <i>Report on Family Law, Part IV: Family Property</i> (1974) at 1-2	296
---	-----

(b) Trust Doctrine

LRCC, Working Paper 8, <i>Family Property</i> (1975) at 9-11	297
Note: The Doctrine of Resulting Trust	298
Donovan WM Waters, “The Doctrine of Resulting Trusts in Common Law Canada” (1970) 16 <i>McGill LJ</i> 187 at 188-191, 194-95, 199, 202, 205-7	298
Note: <i>Murdoch v Murdoch</i> , [1975] 1 SCR 423 and <i>Rathwell v Rathwell</i> , [1978] 2 SCR 436	301
<i>Pettkus v Becker</i> , [1980] 2 SCR 834	304
“Woman’s Suicide Ends Fight for Rights”, <i>Globe and Mail</i> , Nov 12, 1986	310
“Ontario Fee System Cited in Woman’s Legal Woe”, <i>Globe and Mail</i> , Nov 13, 1986	311
“Payout ends tragic story of farm wife’s legal battle”, <i>Globe and Mail</i> , May 26, 1989	313
Note: <i>Sorochan v Sorochan</i> , [1986] 2 SCR 38	313
<i>Peter v Beblow</i> , [1993] 1 SCR 980	315
Note: Constructive Trust after <i>Peter v Beblow</i>	328
<i>Kerr v Baranow</i> , 2011 SCC 10, [2011] 1 SCR 269	325
Notes and Questions	348
Note: <i>Kerr v Baranow</i> on Rehearing, 2012 BCSC 122	349
Alberta Law Reform Institute, “Property Division: Common Law Couples and Adult Interdependent Partners: Final Report” (June 2018) at 15-21	354

(c) Statutory Reform and the “Partnership Principle”

Winnifred Holland, “Reform of Matrimonial Property Law in Ontario” (1978) 1 <i>CJFL</i> 1 at 9-12	357
--	-----

John Eckelaar, “Adjustment on Divorce”, ch 6 in <i>Family Law and Social Policy</i> , 2 nd ed (1984) at 100-107	358
Martha Fineman, “Implementing Equality” [1983] <i>Wisconsin L Rev</i> 789 at 790-793, 811, 813-814, 820-826, 832-833	361
(d) Statutory Reform in Ontario: the 1978 FLRA to the 1986 FLA	
Lorne Wolfson, <i>The New Family Law Act</i> (1987) at 2-7	364
Note: 2009 Amendments to Part I of the FLA.....	367
B. Part I of <i>Family Law Act</i>, 1986	
(a) Application	
Note: Application of the FLA to Unmarried Couples	368
Note: Application of Matrimonial Property Law to First Nations Women.....	369
(b) Overview of the <i>Family Law Act</i>	
Ontario Law Reform Commission, <i>Report on Family Property</i> (1993) at 9-16	372
Law Reform Commission of British Columbia, <i>Working Paper on Property Rights on Marriage Breakdown</i> (1989) at 74-78, 80-83, 85-86, 91-96.....	375
(c) Applying the FLA: Calculating the Equalization Payment	
Susanne Goodman, “Matrimonial Property”, ch. 5 in LSUC, <i>Family Law</i> (Bar Admission Course Materials, 1999)	379
<i>Skrli v Skrlj</i> , (1998) 2 RFL (3d) 305 (Ont. HC)	390
Note: Equalization Schemes and Bankruptcy (discussing <i>Schreyer v Schreyer</i> , 2011 SCC 35, [2011] 2 SCR 605).....	394
(d) Valuation and Valuation Date Assets	
(i) <u>Valuation Date</u>	
Note on cases	395
(ii) <u>Determining Ownership of Assets</u>	
M A Fredricks, “The Ownership Conundrum”, CBAO, <i>Matrimonial Affairs</i> , May 1990.....	398
<i>Korman v Korman</i> , 2015 ONCA 578	399
Note: <i>Holby v Draper</i> , (2017) ONCA 932	404
Notes (including <i>Rawluk v Rawluk</i> , <i>Caratun v Caratun</i> , <i>Lowe v Lowe</i> , <i>Stone v Stone</i> and OLRC).....	405
(iii) <u>Valuation</u>	
Berend Hovius and Timothy Youdan, “Valuation of Property” from <i>The Law of Family Property</i> (1991) at 291-299	410
<i>Black v Black</i> (1988), 18 RFL (3d) 303 (Ont HC)	413
Susanne Goodman, “Tax Obligations and other Costs of Disposition” from LSUC, <i>Family Law</i> (Bar Admission Course Materials, 1999).....	414
Note: 2009 Amendments and Notional Disposition Costs	416
(e) Deductions and Exclusions	
Berend Hovius and Timothy Youdan, “Negative Net Family Property” from <i>The Law of Family Property</i> (1991) at 383-389.....	417
Note (family loans—debt or gift?; contingent liabilities; hindsight evidence)	420
<i>Zavarella v Zavarella</i> , 2013 ONCA 720	420
Note: <i>Jackson v Jackson</i> , 2013 ONSC 7884	425
<i>Folga v Folga</i> (1986), 2 RFL (3d) 358 (Ont HC .).....	425
Note: <i>Nahatchewitz v Nahatchewitz</i> (1999), 1 RFL (5 th) 395 (Ont CA)	427
Note: <i>Linov v Williams</i> , 2007 CanLII 7407 (Ont SC)	428

Berend Hovius, “The Family Home: Legal Treatment in Ontario” (2010) 29 <i>CFLQ</i> 119 at 124-27 (“Special Treatment of a Matrimonial Home in the Calculation of NFPs”).....	428
Note (differences in treatment of DOM property and excluded property).....	430
<i>Black v Black</i> (1988), 18 RFL (3d) 303 (Ont HC)	430
Note: Proposed Amendments to the FLA re Exclusions, Deductions and Special Treatment of the Matrimonial Home.....	431
Some Notes on Tracing Excluded Property (discussing <i>Oliva v Oliva</i> (1998), 12 RFL (3d) 334 (Ont CA), <i>Townshend v Townshend</i> , 2012 ONCA 868 and <i>Martin v Sansome</i> , 2014 ONCA 14)	432
(f) Continued Relevance of Constructive Trust	
Note.....	434
<i>Rawluk v Rawluk</i> , [1990] 1 SCR 70	435
Note: Reverse Constructive Trust.....	441
Note: OLRC 1993 Recommendations	442
<i>Martin v Sansome</i> 2014 ONCA 14.....	443
Note: <i>Halliwell v Halliwell</i> , 2017 ONCA 349.....	450
Berend Hovius, “Unjust Enrichment Claims by Spouses upon Marriage Breakdown: Achieving a Measure of Fairness or Causing Uncertainty and Complexity” (2014), 33 <i>CJFL</i> 140 at 170-172	450
(g) Sample NFP Problems	
Berend Hovius, “Sample Problems” from Hovius, <i>Family Law Cases and Materials</i> (1992), pp. 365-366	453
(h) Departures from Equalization	
(i) Short Marriage	
Berend Hovius, “Unequal Sharing of Net Family Properties under Ontario’s <i>Family Law Act</i> ” (2009) 27 <i>CFLQ</i> 147 at 177-182 (“Short Period of Cohabitation”)	454
<i>Pope v Pope</i> (1999), 42 OR (3d) 514 (Ont CA).....	456
<i>Gomez v McHale</i> , 2016 ONCA 318	460
(ii) Debts and Depletion of Assets (and Extent of Court’s Power under s. 5(6))	
Berend Hovius, “Unequal Sharing of Net Family Properties under Ontario’s <i>Family Law Act</i> ” (2009) 27 <i>CFLQ</i> 147 at 170-177 (“Debts Incurred Recklessly or in Bad Faith” and “Intentional or Reckless Depletion of NFP”).....	462
Note: <i>Consentino v Consentino</i> , 2015 ONSC 271.....	466
<i>Von Czieslik v Ayuso</i> , 2007 ONCA 305	467
(iii) Unequal Contributions	
<i>LeBlanc v LeBlanc</i> [1988] 1 SCR 217.....	473
Kim Zarzor, “A New Day in a Hard Life”, <i>The Toronto Star</i> , Feb 16, 1988.....	476
<i>Berdette v Berdette</i> (1988), 14 R.F.L. (3d) 398 (Ont. H.C.)	478
Notes: <i>McInnis v McInnis</i> , unreported, Ont Gen Div 1990; <i>Martin v Martin</i> , 2007 2007CarswellOnt 683 (Ont SCJ), and <i>Dillon v Dillon</i> , (2010) ONSC 5858	482
Berend Hovius, “Unequal Sharing of the Economic Gain During Marriage in Ontario: An Update” (2012) 31 <i>CFLQ</i> 155 at 170-171 (“Disparity in Contributions Before the Valuation Date”).....	483
Note: Tort Awards for Spousal Misconduct.....	484
(iv) Effect of Special Rules Relating to the Matrimonial Home	
<i>Ward v Ward</i> , 2012 ONCA 462.....	485
(v) Post-Separation Conduct and Anticipated Future Needs	

Note: <i>Merklinger v Merklinger</i> , (1992), 43 RFL (3d) 109 (Ont Gen Div), aff'd. (1996), 26 RFL (4th) 7 (Ont CA); <i>Tamitegama v. Tamitegama</i> , unreported, 1993, Ont Gen Div.	487
Berend Hovius, “Unequal Sharing of Net Family Properties under Ontario’s <i>Family Law Act</i> ” (2009) 27 <i>CFLQ</i> 147 at 190-192 (“Abdication of Responsibilities & Other Conduct after Valuation Date”)	488
(vi) <u>Post-Separation Changes in the Value of Property</u>	
<i>Serra v. Serra</i> , 2009 ONCA 105.....	490
Berend Hovius, “Unequal Sharing of the Economic Gain During Marriage in Ontario: An Update” (2012) 31 <i>CFLQ</i> 155 at 174-176 (“Changes in Property Value After the Valuation Date”)	500
Notes and Questions	502
OLRC, <i>Report on Family Property</i> (1993), pp 68-71	502

VI. THE MATRIMONIAL HOME

A. Introduction and Overview of Part II of the Family Law Act

Berend Hovius, “The Family Home: Legal Treatment in Ontario” (2010), 29 <i>CFLQ</i> 119 at 119 (“Introduction”)	504
Lorne Wolfson and Barry Corbin, “The Matrimonial Home Under the FLA” (1987), 2 <i>Money and Family Law</i> at 1-8.....	504
Note: <i>Debora v Debora</i> (2006), 33 RFL. (6 th) 252 (Ont CA)	507
<i>MacFarland v MacFarland</i> , 2009 CarswellOnt 2949 (Ont SCJ).....	507

B. Orders for Exclusive Possession

Berend Hovius, “The Family Home: Legal Treatment in Ontario” (2010), 29 <i>CFLQ</i> 119 at 141-48, 150-54, 156 (“Orders for Exclusive Possession”).....	512
<i>Pifer v Pifer</i> (1986), 3 RFL (3d) 167 (Ont Dist Ct).....	516
<i>Hill v Hill</i> (1987), 10 RFL (3d) 225 (Ont Dist Ct)	517
<i>Menchella v. Menchella</i> , 2012 ONSC 6304, 2012 CarswellOnt 13842	520
Note: Groups Excluded from the Protections of Part II of the FLA.....	522
Berend Hovius, “The Family Home: Legal Treatment in Ontario” (2010), 29 <i>CFLQ</i> 119 at 119-124 (“Occupation Rights of Common-Law Partners”)	523
Note: Restraining Orders	524
Justice Geraldine Waldman, “The What and the Why of the Proposed Integrated Domestic Violence Court”, CBAO, 22 (2) <i>Matrimonial Affairs</i> , November 2010.....	525
Berend Hovius, “The Family Home: Legal Treatment in Ontario” (2010), 29 <i>CFLQ</i> 119 at 157-160 (“Orders at Trial”).....	528

B. THE ECONOMIC CONSEQUENCES OF DIVORCE

Note: The Economic Consequences of Divorce

In her book *The Divorce Revolution* (New York: Free Press, 1985) Lenore Weitzman documented a dramatic decline in the economic circumstances of women and children after divorce:

This research shows that, on the average, divorced women and the minor children in their households experience a 73 per cent decline in their standard of living in the first year after divorce. Their former husbands, in contrast, experience a 42 per cent rise in their standard of living.

It subsequently came to light that Weitzman's research was flawed and that the gender-gap in post-divorce standards of living in her sample was not as extreme as she had reported. Replications of her analysis produced estimates of a 27 percent decline in women's standard of living (rather than 73 percent) and a 10 percent increase in men's standard of living (rather than 42 percent): see Richard Peterson, "A Re-evaluation of the Economic Consequences of Divorce" (1996), 61 *Am Soc Rev* 528. In her reply to Peterson [at 537 of the same issue of the *Am Soc Rev*] Weitzman acknowledged the errors in her research but states:

...I urge that we not lose sight of the major finding of *The Divorce Revolution*—and of all other research in this area—that women and children are unfairly and disproportionately burdened by divorce. While it is likely ...that the gender gap is less than I reported, even if the post-divorce standards of living, as Peterson contends, drop an average of *only* about 30 percent for women, and rise *only* about 10 percent for men, *that is still a 40 percent difference between the two—and that outcome is unconscionable for a legal system and a society committed to fairness, justice, and equality.*

Studies from the 1990s confirmed that the economic consequences of divorce in Canada conformed to the general patterns found in the United States, Australia and Britain, *i.e.*, significant gender disparities in post-divorce standards of living and in rates of impoverishment. A 1990 study by the federal Department of Justice, based on interviews with 599 divorced or divorcing persons in four different sites, found that women's average income following divorce, including support, was 69 percent of men's income, after paying support. Some 46 percent of women had incomes below the poverty line, in contrast to only 13 percent of men. Using a larger sample of approximately 1500 court files in divorce cases, the Department of Justice study found that, taking support payments into account, two-thirds of the women had incomes that put them below the poverty line. See Department of Justice, Canada, *Evaluation of the Divorce Act, Phase II: Monitoring and Evaluation*, May 1990.

Ross Finnie, using data based on Canadian tax files—the Longitudinal Administrative Database (LAD)—found that both men and women experienced a decline in family income after divorce. Men's family income dropped on average by 20 percent while women's dropped by 40 percent in the first year of divorce. However, in terms of economic well-being, measured by income-to-needs ratios which take into account the number of persons in a household, he found sharp divergences between men and women. Men experienced modest improvements in economic well-being (20 percent on average) while women experienced a 30 percent decline. Finnie found an overall post-divorce poverty rate of 17 percent for men and 43 percent for women. See Ross Finnie, "Women, Men and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data" (1993), 30 *Can Rev Soc and Anthr* 204.

Have the economic consequences of divorce changed since 1993 as a result of significant law reform efforts, increased government benefits for low income families

(f) Continued Relevance of Constructive Trust

This section of the materials will deal with the availability of the doctrine of constructive trust (dealt with above) to determine initial issues of ownership in the calculation of each spouse's NFP. The initial determination of ownership can significantly influence the NFP calculation. A constructive trust may be one way a spouse can claim a share of excluded property to which he or she contributed. As well, constructive trust will make a difference in cases where property values change between valuation day (usually the date of separation) and the date of trial. In the case of rising property values, the FLA only entitles the spouse with lower NFP to a monetary payment calculated on the basis of separation date values, rather than an interest in the property and hence a right to share in any increases in value. In the case of decreasing property values, a spouse with the higher NFP will be required to make an equalization payment based on the separation date value of property, but the property may have decreased significantly in value and the spouse may not even have adequate resources to make the equalization payment. If the spouse with the lower NFP had had an ownership in the property, they would have been required to absorb part of that post-separation loss.

If the courts had been more willing initially to apply s. 5(6) to deal with the inequities created by significant changes in the value of property between the date of separation and the date of trial, the issue of resort to doctrines of constructive trust may not have arisen. However, in the early case of *Kelly v Kelly*, (1986), 50 RFL (2d) 360 (Ont HC), the court ruled that s. 5(6) could not be used to consider post-separation events and this interpretation took hold. Hence the growing attractiveness of the constructive trust and the reverse constructive trust. In 1990 the Supreme Court of Canada ruled in *Rawluk v Rawluk*, below, that doctrines of constructive trust remained available under the FLA as part of the first step of determining the ownership piles of the spouses on V-day.

The 2009 decision of the Ontario Court of Appeal in *Serra v Serra*, 2009 ONCA 105, found below, which recognizes that market-driven post-separation changes in the value of property may be the basis for a departure from equalization under s. 5(6) of the FLA, may reduce the reliance upon claims for a constructive trust or a reverse constructive trust in the context of property litigation between married spouses.

As well, as the earlier material on trusts has shown, the law on constructive trust has continued to evolve since *Rawluk*, with emphasis being placed on its anchorage in the underlying doctrine of unjust enrichment. This has led to the recognition that the constructive trust is only one of several possible remedies to unjust enrichment. As we have seen, there is now a presumption in favour of monetary remedies, with the constructive trust, which grants an actual interest in the property, limited to cases involving a fairly direct causal connection between spousal contributions and the property. When a monetary remedy is awarded, it will have no advantages over an equalization of NFP as the monetary remedy will likely be calculated on the basis of separation date property values.

Most recently, the Ontario Court of Appeal decision in *Martin v Sansome* 2014 ONCA 14 has further limited the use of doctrines of constructive trust and unjust enrichment in cases involving married couples under Part I of the FLA by ruling that a monetary remedy for unjust enrichment doctrine should only be resorted to at the end of the equalization process, i.e. only where there is unjust enrichment that has not been addressed through the equalization provisions of the FLA.

